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CONSTRUCTION.

This title will, perhaps, serve as well as any other to suggest the two-fold subject of this article. Construction, as applied to a writing, usually means to a lawyer the bringing of the intended meaning out of the words used. To quote from Jones on the "Construction of Commercial and Trade Contracts," "the construction of a contract is the ascertainment of the thought which its language expresses"; or, as Lord Chelmsford puts it, "the construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used." To the lay mind the construction of a writing may as naturally mean its creation, the making of it, or the putting together of the necessary words to express the meaning intended. This is not mere coincidence of forms. The two verbs "construct" and "construe" have the same derivation; and a little reflection will bring out the similarity of the processes of construction in the two senses. To construct a writing is to put together words, being unlimited in the choice, to express a given meaning. To construe a writing is to make out or, it may well enough be said, to construct a meaning out of words given. It is obvious that the art of constructing writings and the art of construing them are closely akin. Skill in the one can hardly be acquired without acquiring at the same time some skill in the other. Ignorance of the one implies ignorance of the other. Training in the one is necessarily, to some extent, training in the other. To emphasize the importance of some systematic training in both these branches and to suggest the feasibility and utility of the study of the two together, are the purposes of this article.

I doubt whether I have anything to say which is new or original—anything which is not fairly obvious. But the obvious is peculiarily apt to escape consideration. What we see every day too rarely sets us thinking.

Now, if we take up first the art of construing writings, it will not be necessary to argue the proposition that it is an art as frequently required as any in the work of the lawyer. Writings are of many kinds. There are statutes, codes, wills, deeds, contracts and other documents. How much of the time of the courts is taken up in construing them may be fairly appreciated by taking down at random a volume of current reports and examining the cases. It would hardly be hazardous to wager that one-half of the cases will be found to involve construction, that in one-half of the cases some question is presented as to the mere meaning of written words, as distinguished from questions of legality or validity. Take into consideration, also, the opinions of courts and the necessity, under the doctrines of precedent and *stare decisis*, of construing the language previously used by the judges, and the estimate of the amount of construction in the courts will rise much higher.

But, speaking generally, only a comparatively small part of a lawyer's work is in the courts. In an active practice hardly a day passes in which the lawyer is not called upon, in his office or in conference or negotiations, to determine the meaning of some provision of a statute, will, deed, contract, decision or other writing.

Again, as to the making of writings, for various purposes and in connection with interests present and future, large and small, simple and complex, the lawyer's skill in this line is demanded daily.

The magnitude of that part of a lawyer's work, in the office, at the bar and on the bench, which involves construction in one sense or the other, is obviously such as to demand more attention than it seems to have received in connection with legal education.

Furthermore, the nature of this work peculiarly demands training. Much can be done in the law, with fair results, by undisciplined industry not backed by learning. The dull plodder, without much learning or mental discipline, may find an authority which answers his client's question or wins his case in court. A much higher order of skill is required to draw a will or contract, or to construe an agreement or a statute the effect of which has not been judicially determined. Decided cases give

aid only indirectly. It is practically hopeless to seek for a precedent as to construction, or a form to follow in drafting an instrument, which exactly fits. If the same language shall be found to have been construed, the surroundings will not be found to be the same. A form book will more probably lead astray an unskilled draftsman. There is the need of judging whether or how far the precedent or the form fits the case in hand. This requires the same order of skill, perhaps in less degree, as drafting or construing without the aid of precedent. And this skill can be acquired only by training, and by training which cannot be got in a day or a week, training which not only gives a working knowledge and appreciation of the meaning of words and the structural rules of language, but develops habits of thought, including the easy use of the imagination.

Is it asked, "Are lawyers generally so trained?" Certainly not, in any satisfactory sense, before they begin practice. Only in their practice, as a rule, and then not systematically but only as the training comes in their professional work. In their collegiate education some have acquired part of the necessary knowledge and discipline—especially in the study of the classics. But of conscious training for this branch of work, either before admission to the bar or afterwards other than in their practice as it has developed, very few lawyers have had the benefit. There are, of course, many things which go to make the thoroughly equipped lawyer, which only experience can give. But whatever can be, should be given in the preparatory education. And the training now referred to can, I believe, be better got, or at least better started (the education of a good lawyer never ends until he quits) by systematic study than by chance experience.

The layman may ask, in view of what has been said: "Why go to a lawyer to have a will drawn, or an agreement?" There may be some question of law, as to the power to dispose of property by will or as to the mode of execution, or as to the validity of what is proposed to be embodied in the agreement. If there is no such question but it is only necessary to express clearly, without ambiguity, and fully, with a view to possible contingencies, a known intention, it would require some boldness to assert that the work would be better done by the average lawyer, not having had special experience in this line, than by a layman of the same intelligence and general education. The same thing substantially is true as to construing a writing. Certainly it is safe to say that there would be little choice, for such work, as

between the ordinary lawyer just admitted to practice and a business man of like age and general education. I can think of no study, prior to admission to the bar, which seems to have been of special benefit to me with a view to these branches of work (excluding the questions of law arising in the connection), except the general study of languages, and especially the study of Latin because of its orderly structure.

And yet work of this kind is apt to be of the most responsible kind, and a lawyer trained for it can render to his clients services the most important and the most valued. In this line lies the most remunerative work and that which involves the greatest amount of personal confidence, of the kind which binds the client most firmly to his lawyer. Reputation for skill in expressing what is intended so that there can be no mistake about it, and in construing language so as confidently and correctly to declare its meaning, is worth more, pecuniarily, than reputation for any other of the talents or acquirements of a lawyer. Millions are often invested in reliance upon a lawyer's opinion of the meaning of a statute. Investments and business enterprises of great magnitude are made or entered upon, with confidence, because the agreements upon which they rest have been drawn by lawyers of known skill in such work. It is unnecessary to enlarge. This is as obvious as the other things to which I have called attention.

There is no more fascinating work in the law than construction. There are moments of irritation because of the slovenly work of the draftsman, his verbosity perhaps, his lazy effort to clear one obscurity by adding another instead of removing the first. There are times when we may well recall the remark of Sir Robert Peel, whom Dr. Lieber quotes as saying that he "contemplates no task with so much distaste as the reading through an ordinary act of Parliament." But still the work is fascinating, of shaking out the words and letting in the light, comparing one phrase with another, seeking to put one's self in the attitude and surroundings of the writer, testing one hypothesis and another and finally reaching a conclusion which can be asserted with confidence and backed by logic. It would be cause for grief to lawyers who have enjoyed such work to think that the occasion for it might soon cease. And so it is no hardship to agree with Dr. Lieber when he says, in his very interesting work on "Hermeneutics," that "the very nature and essence of human language * * * renders a total exclusion of every imaginable misapprehension, in most cases, absolutely impossi-

ble." Improvement in the use of language may go on then indefinitely. And yet, while there are courts and lawyers, they will be furnished with plenty of the pleasure of construction, or, as Dr. Lieber himself would say, of interpretation and construction, since he gives to construction a different meaning from that given it by the writers quoted at the beginning of this article.

But still a study of the cases involving construction cannot but leave a strong impression that the art of expressing thought in words so that ambiguity and uncertainty are avoided, has been sadly neglected, and that training in this art is needed among lawyers. If such training were what it should be, much of the work of construction would be done away with. Of course, it would be unfair to assume that all or nearly all the writings which come before the courts are the work of lawyers. But enough of them are to point the moral. And until it shall be the rule that lawyers are experts in this art, it will hardly do to criticise the layman, except in special cases, for drawing his own agreements, when no question as to what he may agree or other question of law is involved. The layman has often lost by his lawyer's lack of skill. In the present conditions, it is not always easy for him to discover what lawyer within reach is expert in this line.

Let us briefly look at the work involved in the drawing of a writing and at the same time observe how much akin this work is to the art of construing. It will, I think, become clear that the two arts may best be studied together. Suppose, for instance, a will is to be drawn. Put aside all questions as to any restraints of the law, assuming that the intention of the testator is entirely permissible and only needs to be clearly stated. There is need at the outset of some construction of words, not, however, without outside aid. The client states what he wishes to provide. What he states must be construed, made plain and certain; and so put to him for confirmation or correction. When his purpose in a general way is apprehended, a rough sketch of the will may be made. Then, especially, comes in the work of the imagination. Imagine the various possible happenings in the meantime which may produce various conditions when the will shall take effect. Suppose a wife, a son or a daughter dies, will the will accord with the testator's purpose? If the estate is disposed of by giving fixed sums to certain persons and the residue to others, will it operate aright if the testator's fortune should be considerably increased or diminished? The consideration of present circumstances and also of various

possible sets of circumstances at the testator's death in this case, finds it parallel when the task is reversed and we are called upon to construe. An instrument is always to be construed in the light of the attitude and surroundings of him or those who made it. After such questions as above are settled, not by construction but by reference to the client, the will will be substantially completed. Thereafter, the careful lawyer will examine the language in detail. And this examination will proceed in large part in the same way as if the same will were brought to him for construction after it had become operative. He will seek for ambiguities, not now to solve them but to remove them. He will bear in mind the recognized rules of construction, not now to find out what the testator's intention was, but to see whether the application of such rules may mislead as to the intention which is known to him. He may find that different expressions have been used in different paragraphs when the intention was the same, and change the one or the other to make the paragraphs conform. He may find that he has used a word in a technical sense, and will either add something to make this clear or substitute words which in their plain and ordinary sense convey the meaning intended. He may see a possible ambiguity prevented only by punctuation, and change the order of the words so that punctuation may be disregarded and yet the sense be certain. In general, as in construing he would put himself back in imagination to the time and amid the surroundings of the testator; so, in putting the will in final shape, he will put himself forward and look at the document as though it were presented to him for construction after the testator's death.

Careful study of language, both as to the ordinary meaning of words and as to proper arrangement of words and clauses, will aid the lawyer alike in drawing and in construing; although in construing he must at the same time recognize that comparatively few persons write according to rule.

But enough has been said as to the importance of training in these two branches of work and as to the relation between them. Certainly so, if it is all as obvious as it seems to be. It remains only to make one or two practical suggestions. It is not altogether easy to map out a scheme of class-room study in these two subjects. Much will depend on the teacher. But, whether with a teacher or not, I venture to suggest that fair training in these branches may be acquired in some such way as the following. Read Jones on the "Construction of Commercial and Trade Contracts," a book which is pleasant and interesting read-

ing, simply as such, without any ulterior purpose; or Lieber's "Hermeneutics," which, though more profound, will easily hold attention when once begun; or Sedgwick on the "Construction of Statutes." The rules of construction are not arbitrary rules like the provisions of a code of practice. There is no need of memorizing them. It is necessary only to appreciate them. They are derived from observation of the ordinary usages of men. They are acknowledged by common sense when stated, and when acknowledged they are practically learned. If they were not so acknowledged by persons of average intelligence they would lack their only foundation. So a rather hurried reading will put the mind of the reader into very fair relation with the subject, though the words of all the rules be forgotten. Here, again, we are dealing with the obvious. Then, take cases cited here and there by the author. Take the writing before the court. Examine it to discover where the ambiguity lies. Redraw it to express the one possible meaning and then the other, in such a way as to make doubt impossible. Then read the opinion and revise the work. In this connection, have some regard for brevity. After the writing has been robbed of ambiguity, see if it cannot be cut down, expressed more simply and more briefly without loss or even with increase of certainty. Brevity and simplicity are at a premium in these days. Nothing pleases clients more (especially intelligent business men) than to see an agreement put so simply and briefly that it is no task to read it and take in its meaning. Writings are not now estimated by the yard or by the learning implied in the use of unusual words.

A law student who works on these lines with some thoroughness will be better qualified at graduation to draw and construe writings than many lawyers who have been in practice for years; although experience only will make an expert.

Much attention is paid in our universities in these days to debating, to training in the oral use of language to convince; much also to the study of the proper use of English in writing generally. It is fitting that in our law schools especial attention be paid to the use of language to express intentions, in wills, statutes, agreements and other writings with which the practice of the law has to do, with simplicity and brevity and especially with the utmost possible certainty. It may be that this has already been done to an extent unknown to me. I should certainly be very glad to be convicted of ignorance in this respect, especially as regards the Law School of Yale University.

Thomas Thacher.